

ORDER NO. 79258

In the Matter of the Petition of Core	*	
Communications, Inc. for an Expedited	*	
Declaratory Ruling Regarding the	*	Case No. 8978
Growth Cap Provision of the ISP Order	*	
on Remand.	*	

* * * * *

On December 3, 2003, the Public Service Commission of Maryland (“the Commission”) issued Order No. 78818 in this matter granting, in part, Core Communication, Inc.’s (“Core’s”) Petition for Expedited Declaratory Ruling Regarding the Growth Cap Provision of ISP Order on Remand Pursuant to Various Orders of the Commission in Case Nos. 8909, 8911 and 8914. Both Core and Verizon Maryland, Inc. (“Verizon”) requested reconsideration/rehearing of Order No. 78818.

On January 2, 2004, Core filed a Petition for Clarification and Rehearing and Verizon filed a Petition for Reconsideration. On January 20, 2004, Core filed an opposition to Verizon’s Petition for Reconsideration. On January 23, 2004, Verizon filed a Motion for Leave to File a Response to Core’s Petition and a Response to Core’s Petition. On February 10, 2004, Core filed a letter requesting leave to reply to and replying to Verizon’s response. As an initial matter, the Commission notes that its procedural rules do not provide, as a matter of right, for a party to file a response to a petition for rehearing or reconsideration. The Commission grants Verizon’s motion for leave to file a response to Core’s petition and hereby accepts the response filed in this matter on January 23, 2004.

Although Core has not requested leave to file a response to Verizon’s petition, the Commission will treat Core’s January 20, 2004 filing as including such request, and hereby grants Core’s request and accepts the response filed in this matter on January 20,

2004. Likewise, the Commission also accepts the letter filed by Core on February 4, 2004.

Upon review of the respective filings of both Core and Verizon, the Commission reaffirms Order No. 78818. The Commission will herein clarify the appropriate approach for addressing a claim by Verizon for overpayment in 2002. As to the arguments raised in both parties' petitions, the Commission finds that the parties have largely relied upon the arguments they have previously advanced in this matter and in Case Nos. 8909, 8911 and 8914. The Commission remains persuaded that its findings and analysis regarding the Federal Communications Commission's ("FCC's") ISP Order on Remand is sound, comports with the Order on Remand and implements the goals of that Order and the Orders of the Commission implementing changes in the ISP reciprocal compensation regime.

In its Petition for Clarification and Rehearing, Core asserts that the Commission may have inadvertently retroactively applied 2001 traffic levels as the baseline for the part year cap applicable to 2003. Core also seeks rehearing of what it describes as the "evergreening" of the 2003 cap into 2004 and subsequent years. Finally, Core strenuously objects, on both procedural and substantive grounds, to Verizon's use of self help and its unilateral decision to offset amounts Verizon claims was overpaid in 2002 in light of the Commission decision in Order 78818. Core would have the Commission determine that no growth cap applied in 2002, or in the alternative, that the Commission should decline to consider the issue first raised in Verizon's Petition for Reconsideration. As Core correctly notes, in its initial response to Core's Petition for

Declaratory Relief Verizon said it would seek relief on the issue of overpayment in 2002 in a separate proceeding.¹

Core's first request is that the Commission grant rehearing to eliminate what it describes as an inadvertent and mistaken retroactive reliance by the Commission on 2001 levels in calculating the 2003 growth cap. The Commission determines that a grant of rehearing on this issue is not warranted. As set forth in the Commission's Order the part year 2002 cap was calculated using the design set forth in the FCC's ISP Order on Remand for September 17 to December 31, 2002. In no way did the cap for that limited period deprive Core of the actual minutes for which it was compensated in 2002 prior to September 17th – prior to the effective date of its interconnection agreement amendment with Verizon invoking the applicability of the FCC's ISP Order on Remand.

Core next requests that the Commission reverse its finding establishing the 2003 growth cap as a continuing growth cap for 2003, 2004 and beyond, until some other direction is given by the FCC. As to this issue, Core argues that the FCC has not definitively adopted “bill and keep” as the “new” regime for ISP reciprocal compensation. While this may be true in explicit terms, the goals of the FCC to adopt a pricing regime more consistent with costs was made manifestly clear and the Commission's Order clearly tracks that approach.

The assertions of Core with regard to the 2003 and beyond growth cap are speculative and premature. As an initial matter, it should be noted that the imposition of a growth cap is not the equivalent of bill and keep. If the FCC adopts some other ISP

¹ In light of Verizon's representations in this regard, the proper course of action would have been to pursue this issue separately, rather than to exercise self-help as it did.

reciprocal compensation regime (other than bill and keep) or prescribes growth caps for 2004 and beyond, at that time Core may use the change of law provisions of its interconnection agreement to effectuate any such ruling, and if necessary seek Commission assistance in arbitrating further amendment to the terms and conditions of its interconnection agreement.

As noted above, Verizon also petitioned the Commission for reconsideration on this matter. Verizon's entire Petition for Reconsideration, however, restates its earlier pleadings in this case. At most, other than that which has already been argued before, Verizon takes exception with the Commission's distinction between new interconnection agreements and "evergreen" agreements. According to Verizon, this reading of the FCC's Order on Remand is not supported in this case.² Verizon's arguments to the contrary, however vigorously asserted, are unpersuasive.

The final remaining issue is Verizon's desire to offset amounts it claims were overpaid in 2002. As Core correctly notes, in its initial response to Core's Petition for Declaratory Relief, Verizon said it would seek relief on the issue of overpayment in 2002 in a separate proceeding.³ In its letter filed with the Commission dated February 6, 2004, Core raised both procedural and substantive objections to Verizon offsetting any payments due for 2003 for a claimed overpayment from 2002. In light of Verizon's assertions that it would address its claimed 2002 overpayment in a separate proceeding, and Core's objections to an offset, the Commission declines to address this issue at this late stage of these proceedings. If Verizon wishes to seek a refund from Core for any

² Verizon Petition for Reconsideration at 6.

³ In light of Verizon's representations in this regard, the proper course of action would have been to pursue this issue separately, rather than to exercise self-help as it did.

amounts it claims it overpaid in 2002, it may file a separate complaint. In the meantime, however, Verizon shall not be permitted to use self-help to offset amounts due to Core in 2003. Verizon is hereby directed to pay Core an amount of compensation consistent with the methodology prescribed by the Commission in Order No. 78818 for 2003.

IT IS THEREFORE, this **9th** day of **July**, in the year Two Thousand and Four, by the Public Service Commission of Maryland,

ORDERED: (1) That the Petition of Verizon Maryland Inc. for Reconsideration of Order No. 78818 is DENIED;

(2) That the Petition of Core Communication, Inc. for Clarification and Rehearing of Order 78818 is GRANTED in part, such that Verizon Maryland, Inc. is directed not to offset amounts due to Core for 2003 with a claimed overpayment from 2002.

Commissioners